

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

**COLUMBIA COUNTY SHERIFF'S DEPARTMENT
EMPLOYEES UNION, LOCAL 2698-C,
COUNCIL 40, AFSCME, AFL-CIO, Complainant,**

vs.

COLUMBIA COUNTY (SHERIFF'S DEPARTMENT), Respondent.

Case 300
No. 69219
MP-4540

Decision No. 32883-A

Appearances:

Neil Rainford, Staff Representative, Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, Wisconsin, 53717, appearing on behalf of Columbia County Sheriff's Department Employees Union, Local 2698-C, Council 40, AFSCME, AFL-CIO.

Joseph Ruf, III, Columbia County Corporation Counsel, 120 West Conant Street, P.O. Box 63, Portage, Wisconsin, 53901, appearing on behalf of Columbia County (Sheriff's Department).

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On October 5, 2009, Local 2698-C, AFSCME, AFL-CIO, affiliated with Council 40, filed a complaint with the Wisconsin Employment Relations Commission alleging that Columbia County had committed a prohibited practice within the meaning of Sec. 111.70(3)(a)5 and derivatively 1, Wis. Stats, by failing to provide certain vision insurance benefits required in Article 17 Section 1 and Appendix D of the parties' collective bargaining agreement. This case originated as a grievance arbitration case filed with the Wisconsin Employment Relations Commission as case No. MA-14384 wherein the undersigned was designated as the arbitrator. After that matter had been set for hearing the parties realized that in their collective bargaining agreement there is a provision that disputes under the insurance provisions shall not be subject to the grievance procedure in the collective bargaining agreement but rather shall be subject to the complaint procedure under Chapter 111.70 of the Wisconsin Statutes. The parties agreed to have the case re-filed as a complaint case, adjust the pleading formalities, seek to have the undersigned appointed as Examiner, and keep the hearing date previously scheduled for the grievance arbitration hearing to be used for the hearing on the complaint. The instant complaint was then filed. On October 5, 2009 the Commission appointed Paul Gordon, Commissioner, to act as the Examiner in this case to

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make and issue Findings of Fact, Conclusions of Law and Order, as provided in Secs. 111.70(4)(a), 111.07(5) and 227.46(3)(a), Wis. Stats., which also provided that the Examiner has final authority to issue a decision of the Wisconsin Employment Relations Commission in this case. Thus, this is a final decision of the Wisconsin Employment Relations Commission on the merits in this case. Also by agreement of the parties, the County entered a verbal answer to the complaint at the hearing on October 6, 2009 in Portage, Wisconsin, denying that it had committed any prohibited practice, and filed a written answer consistent with its verbal answer on November 13, 2009. Hearing was held in the matter on October 6, 2009 with a stenographic transcript being available to the parties by October 19, 2009. The parties filed briefs and reply briefs and the record was closed on December 29, 2009. Having considered the record evidence and arguments of the parties, I hereby make and issue the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. Complainant Columbia County Sheriff's Department Employees Union Local 2698-C, Council 40, AFSCME, AFL-CIO, is a labor organization within the meaning of Sec. 111.70(1)(h), Wis. Stats.

2. Respondent Columbia County is a municipal employer within the meaning of Sec. 111.70(1)(j), Wis. Stats., and maintains a Sheriff's Department.

3. Complainant and Responded are parties to a collective bargaining agreement which was in effect at all times material to this complaint. Predecessor collective bargaining agreements between the parties contained certain provisions which are the same as those in the agreement in effect at all times material to this complaint.

4. The parties' collective bargaining agreement provides for group insurance benefits, and states in relevant part:

ARTICLE 17 – GROUP HEALTH AND LIFE INSURANCE

Section 1. Health Insurance: There shall [be] two group hospital, surgical, dental and vision insurance plans in effect for employees and their dependents. The plans shall provide benefits which are at least equal in all respects to the group plans attached as Appendices B – D; (Appendix B – Summary of Benefits), Dental Plan (Appendix C – Option 4), Prescription Drug Co-Pay and Vision Plan (Appendix D). The employees have an option to choose either the GHT Standard Plan or the GHT Select Plan which is a managed care plan. A dual choice enrollment will be held in the 1st week or October for any employee opting to change plans with coverage to be effective January 1st. The employer shall pay ninety percent (90%) of the GHT Select premiums, or an equal dollar amount towards the GHT Standard premiums. The County shall not pay for duplicate insurance coverage for any employee whose spouse is employed by the County. Employee participation in the group benefits plans will be all inclusive; benefits cannot be separated. The hospital and surgical plan will be affiliated with a managed care program. The plan shall cover all state mandates.

The insurance provider agrees to administer the insurance program in the same manner as any Wisconsin licensed insurance carrier. All matters regarding insurance claims and matters involving underwriting claims shall be handled according to the “presumption of coverage” principle as applied by the State of Wisconsin, Office, Commissioner of Insurance to regular plans.

The insurance provider will promptly respond to any inquiry in the same manner as required by a licensed carrier. The employee will be held harmless for the defense of any or all Judgments granted against the Plan and/or against individual subscribers.

The parties agree that this provision will not be subject to grievance arbitration but will be governed by Chapter 111. of the Wisconsin Statutes.

* * *

5. The only reference to vision coverage in Appendix B referred to in Article 17, above, provides:

APPENDIX B – MEDICAL SCHEDULE OF BENEFITS
FOR ALL ELIGIBLE PARTICIPANTS AND DEPENDENTS

SELECT PLAN

* * *

<u>TYPE OF COVERAGE</u>	<u>IN NETWORK</u>	<u>OUT OF NETWORK</u>
VISION BENEFITS	Select Plan Vision Benefits	Select Plan Vision Benefits

6. The Appendix D referred to in Article 17, above, contains the same language as previous collective bargaining agreements going back to at least 1991, and provides:

APPENDIX D – VISION PLAN

<u>STANDARD EXAMINATION</u>	One (1) every 12 months
<u>STANDARD LENSES</u>	One (1) every 12 months
<u>STANDARD FRAMES</u>	One (1) every 24 months
<u>STANDARD CONTACT LENSES</u>	One (1) every 12 months

7. The Respondent obtains its health plan and vision plan coverage through the County's health insurer, the Wisconsin Counties Association, Group Health Trust (WCA-GHT), which has been the County's insurer since 1991.

8. GHT provides a summary, or plan, of the Respondent's current vision benefits in documentation similar to summaries of benefits for its health insurance and other insurance benefits. This summary of benefits contains more information than that set out in Article 17 and in Appendix D. This summary is the way the plan is being administered by the County. The plan has been the same since 1991 and administered in the same manner since 1991. It is contained in Joint Exhibit 2.

9. The vision benefits summary document contains a Schedule of Vision Benefits and further explanation of the benefits. The vision insurance plan document is provided to all bargaining unit members. The Schedule provides

SCHEDULE OF VISION BENEFITS

	Participating Provider	Non-Participating Provider
Plan Year Copay	None	None (Reimbursed Amounts)
Examination Once Every 12 Months	Covered 100%	\$38
Lenses: Once Every 12 Months Single Vision Bifocal Trifocal Lenticular	Standard Glass or Plastic Covered 100% (Limitations Below ¹)	\$31 \$51 \$64 \$80
Frame Once Every 24 Months	Up to \$102 Retail	\$45
Contact Lenses: Once Every 12 Months	(In lieu of Lenses/Frame) Up to \$150 Retail ²	\$150

¹Limitations:

The Plan provides coverage in full for standard lenses, glass or plastic, any size. Solid tints (Pink 1 or 2) are also covered in full. For gradient tints, NVA-WI will pay the provider for solid tints, with the patient responsible for the difference. Blended and progressive lenses are paid up to the amount covered for standard lenses – patients are responsible for the difference. Coatings, such as UV, scratch, mirror, anti-reflective and edge coatings, are not covered. Sunglass lenses are not covered.

²Additional professional services related to contact lenses (also known as Fitting Fees) would be included in the Contact Lens Allowance shown above.

This document is intended for product overview only and is not a certified document of the individual plan parameters.

10. Vision insurance plans are provided by WCA-GHT for 26 counties, 42 school districts and three municipalities. While coverage for those groups varies in type and amount of vision benefits, for no groups insured under those respective plans is there a plan that pays for both eyeglasses and contact lenses in the same year.

11. For no one covered under the Respondent County vision insurance plan has the plan paid for both eyeglasses and contact lenses in the same year since the plan started in 1991. Other than the grievance which initiated the instant complaint, there have been no grievances or complaints filed by the Union over whether both eyeglasses and contact lenses for the same person are to be paid for in the same year pursuant to the provisions of the collective bargaining agreement and the vision insurance benefits contained therein.

12. Susan Barton has been an employee of Respondent in the Sheriff's Department since 2001 and since then has been a member of the bargaining unit represented by complainant. She has received a copy of the collective bargaining agreement and a copy of the GHT plan for vision benefits in the normal course of her employment.

14. Barton has a dependent son. She and her son are covered under the provisions of Article 17 and Appendix D of the collective bargaining agreement as to vision insurance. For approximately the last 10 years her son has needed vision correction (eyeglasses or contact lenses) and she has used the vision insurance benefit under the collective bargaining agreement to pay for his eye exams, eyeglasses or contact lenses. Prior to 2008 the County vision insurance has paid for either eyeglasses or contact lenses for her son in any given year. The insurance has not paid for both eyeglasses and contact lenses for her son in the same year.

15. In December 2008 Barton's son was seen by his optometrist. Pursuant to that visit he received both eyeglass frames and lenses as well as contact lenses. The charges for this were: exam -\$74.00; disposable contact lenses -\$112.00; metal frame -\$72.00; SV poly lenses (for the frames) - \$69.00. These charges were submitted to GHT for payment. Payment is further administered by National Vision Administrators LLC.

16. When the vision insurance administered payment for the charges in Finding 15, it paid up to certain policy limits for the examination, the glasses frame and the glasses lenses. It paid \$38.00 for the examination, \$45.00 for the frame, and \$31.00 for the SV lenses, for a total of \$114.00. It supplied an explanation of benefits which showed the charges, payments and a Reason Code of (35) and (95) for adjustments, which were also described as: 35 1 This is the maximum benefit allowed under your policy.; 95 1 Maximum benefit allowed for services provided by a non-participating provider.

It did not pay anything for the contact lenses. The same explanation of benefits form showed the contact lenses charge of \$112.00, with .00 allowed and .00 covered amt. It showed the reason code for why it did not pay \$112.00 for the contact lenses. The reason code (96) was described as: 96 1 Your policy schedule allows for payment of either contacts or glasses.

17. After Barton received the explanation of benefits form she compared the collective bargaining agreement with the schedule of vision benefits document. She noticed that the schedule contained the contact lenses limitation of in lieu of lenses and frames, whereas the collective bargaining agreement did not contain the in lieu of lenses and frames limit.

After checking with some of her coworkers, Barton inquired of the County Human Resources Department about the different language concerning the contact lenses and was informed that the schedule of vision benefits is the County vision insurance. The same question and responses were made again. Barton understood the responses to be a refusal to provide her the benefit she thought the collective bargaining agreement provided. She then filed the grievance which eventually resulted in this complaint action.

18. The complaint alleges that Barton was denied the benefit set forth in Article 17 and Appendix D. It contended that the County failed to provide the benefit provided in Article 17 Section 1 and Appendix D of the collective bargaining agreement in violation of Sec. 111.70, Wis. Stats., in particular Subsections (3)(a)5 and derivatively 1. At the hearing in this matter and in its written arguments the complainant has refined its argument to maintain that the Respondent has violated the collective bargaining agreement by not providing the employee with vision insurance coverage for both contact lenses and glasses lenses/frames as required by the collective bargaining agreement in Article 17 and Appendix D – Vision Plan. Complainant does not allege any violations having to do with the limitations on the allowed and covered amounts for the examination and the eyeglass lenses and frames, as explained in codes 35 and 95 and as more fully set out in findings of fact 15 and 16. The Respondent denies that the County denied Barton benefits required under the collective bargaining agreement.

On the basis of the above and forgoing Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. Since the parties' collective bargaining agreement referenced in Finding of Fact 4 contains a provision which gives the Commission the authority to resolve the merits of this Sec. 111.70(3)(a)5 and (3)(a)1 breach of contract claim, the Examiner exercises the Commission's jurisdiction to decide whether said agreement was violated in violation of Sec. 111.70(3)(a)5 and derivatively 1, Wis. Stats.

2. The provisions of Article 17 Section 1 and Appendices B and D do not contain all of the terms and conditions of the benefits otherwise mentioned in the collective bargaining agreement, rendering Appendix D ambiguous.

3. The vision insurance plan and vision summary documents supplied to bargaining unit members more fully, though not completely, set out the terms and conditions attached to Article 17 Section 1 and Appendix D, and reflect an understanding of the parties as to what the terms and conditions are for Appendix D.

4. Under the terms of the collective bargaining agreement and as more fully set out in the terms and conditions for the schedule of vision benefits, coverage for and payment of charges for contact lenses have a condition and limitation of being in lieu of lenses/frames in a 12-month period.

5. The denial of payment for contact lenses during the same year as payment was made for eyeglass frames and lenses for Barton's dependent son was administered in compliance with the schedule of insurance as contained in the vision insurance plan and plan summary, and in compliance with Article 17 Section 1 and Appendix D of the parties' collective bargaining agreement.

6. The Respondent did not breach or violate the collective bargaining agreement and did not fail to provide a benefit to a bargaining unit member required in Article 17 Section 1 and Appendix D of the collective bargaining agreement in violation of Sec. 111.70(3)(a)5, and derivatively 1, Wis. Stats. when it did not pay for both contact lenses and eyeglass frames and lenses in the same year for a bargaining unit member's dependent.

On the basis of the above and forgoing Findings of Fact and Conclusions of Law, the examiner issues the following

ORDER

1. The complaint is denied and dismissed.

Dated at Madison, Wisconsin this 24th day of February, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Paul Gordon /s/

Paul Gordon, Examiner

Columbia County (Sheriff's Department)

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

POSITIONS OF THE PARTIES

In summary, the complainant labor organization argues as follows:

The terms of the collective bargaining agreement in Article 17 and Appendix D are clear and unambiguous and are not subject to multiple interpretations as to whether or not an employee must receive payment for contact lenses and glasses frames/lenses when the two are purchased at or about the same time. The anticipated Employer argument that the collective bargaining agreement contains only a summary of the plan and that the plan itself (Jt. Ex. 2) defines the specifics of the vision benefit, does not withstand the clear language of Article 17 which requires in part that: The plans provide benefits which are at least equal in all respects to the group plans as Appendices B-D (Appendix B-Summary of Benefits), Dental Plan (Appendix C-Option 4), Prescription Drug Co-Pay and Vision Plan (Appendix D). "The Plans" reference at the outset of Article 17 unmistakably refers to the plan purchased by the Employer and contained in Joint Exhibit 2 and this provision of the agreement clearly establishes that Appendix D governs that plan detailed in Joint Exhibit 2 which cannot contain benefits that are not "equal in all respects" to those set forth in Appendix D. The Employer's argument runs in direct conflict with the clear and unambiguous language of the agreement.

Moreover, Appendix D provides for glasses lenses – one (1) every 12 months, glasses frames – one (1) every 24 months, and contact lenses – one (1) every 12 months. This is clear and unambiguous on its face. There is no plausible way to read into this Appendix D schedule of minimum benefits a restriction that the employee must choose between glasses or contact lenses. When the Employer provided a vision insurance plan that limited payment to contact lenses "in lieu of lenses/frames" as in Joint Exhibit 2, it violated Article 17 and Appendix D. The County's denial of the contact lenses benefit through its vision insurance provider's "in lieu of" restriction violated the agreement between the parties and the law that the parties have agreed governs Section 1 of Article 17.

The County claim that the absence of the word "and" or "or" render the clear language of Appendix D ambiguous has no strength as it runs counter to the contract interpretation principal that "to say one thing is to exclude other things." Appendix D affirmatively provides the benefits on a schedule. To say that these benefits will be provided on this schedule is to exclude that they will be somehow limited by the addition of words like "or", "in lieu of", "but" etc. as the Employer attempts in the plan purchased from WCA. The "in lieu of" language directly conflicts with Appendix D. This is why this element of the WCA plan is in dispute, while other provisions establishing dollar caps have not been. The existence of a dispute does not prove ambiguity. The shortfall in the WCA plan may have resulted from oversight or even an intentional effort to save costs. There is no evidence to the contrary or

that the Union was consulted regarding the specific benefits of the WCA plan to provide vision insurance. Outside sources are not instructive in interpreting the contract because Article 17 and Appendix D clearly establish that Appendix D governs the WCA plan detailed in Joint Exhibit 2. Appendix D establishes a threshold. The decisions cited by the County are not on point where they deal with language establishing a hierarchical relationship between sources. And the County's "expert" is really not an expert witness in the field of vision insurance or contract interpretation. The witness's testimony conflicts with Article 17 and testimony regarding benefits to other units of government are misplaced as this is not an interest arbitration matter. The County has violated the law and should be ordered to cease and desist, post appropriate notice of its violation and promises not to violate state law, and make the employee(s) whole for the losses of benefits required by the collective bargaining agreement.

In summary, the Respondent municipal employer argues as follows:

The Union has failed to meet its statutory burden of proof because the collective bargaining agreement does not plainly provide the benefit claimed, the language of the actual plan clearly does not provide the benefit claimed, and there is no evidence that any employee in the bargaining unit ever received the claimed benefit or filed a grievance or complaint relating to not receiving it. The language of Appendix D is at best a very general summary of the vision insurance benefit. It simply lists four components of the vision benefit. Appendix D does not contain either the conjunctions "and" or "or" and it is impossible to determine from its language whether benefit for an exam, lenses and contact lenses will each be provided in separate 12 month cycles or whether one or more of the benefits will be provided in the same 12 months. Appendix D is silent on the issue of the amount the plan pays for exams, lenses, frames, or contact lenses. It can hardly be disputed that without details of benefit dollar amounts the vision benefit would have no practical value. Contract language is ambiguous if subject to at least 2 different meanings, citing arbitral authority. When ambiguous, it is appropriate to use outside sources to determine contract terms, including past practice. Appendix D is ambiguous.

The language of the actual WCA-GHT vision plan does not include a benefit for both corrective eyeglass lenses and contact lenses every twelve (12) months. The actual plan document provides guidance in determining what is covered under the ambiguous Appendix D. The plan has been administered unchanged since 1991. The County has no authority to just unilaterally change either the health insurance company or the vision insurance benefit. The WCA-GHT plan document provides the necessary detail that defines what is and what is not covered by the vision plan. It makes it clear that contact lenses may only be provided in lieu of lenses/frames. The plan document resolves the ambiguity in Appendix D. The bargaining unit members have never received the claimed benefit and have never filed a grievance or complaint alleging a denial of the claimed benefit. The members had copies of the plan document and were aware it contained much greater detail about the vision insurance plan than was contained in Appendix D. Barton knew or should have known that the plan did not include both corrective eyeglass lenses and contact lenses every twelve (12) months. At best she hoped to use ambiguous language of Appendix D to obtain a benefit that simply is not provided under the plan. She admitted that in previous years it did not pay for both. No other

member had both paid for. The County's expert witness was the plan administrator since 1991 and according to her Appendix D is a brief summary of the plan while the actual vision benefit was defined in Joint Exhibit 2. The witness reviewed Barton's claim and Barton received the proper benefit when the plan paid for eyeglasses but did not also pay for contact lenses received at the same time. Upon review, no other County employee or dependant had ever received a benefit for both in the same year. Nor are other groups receiving the benefit of both eyeglasses and contact lenses in the same year.

The Union argues that Appendix D is unambiguous. But, far from being clear, Appendix D is a textbook example of ambiguous contract language. None of the terms are defined. Standard appears four times in Appendix D and we are left to wonder what the term standard means. None of the questions raised by the language could be answered by relying only on the language of the collective bargaining agreement. The term "one" is similarly ambiguous, raising the question of one contact lens or one pair of contact lenses which is actually two lenses, for example. And as to ambiguity, Appendix D makes no mention of dollar amounts of any coverage so there is no way to determine from it alone what amounts the vision insurance plan will pay. It is not disputed that the vision insurance plan document, Joint Exhibit 2, and not the language of Appendix B is accepted and used by the parties to define details of the vision insurance benefit. Where Appendix D is admittedly a vague, ambiguous and incomplete summary of the vision plan as to type and amounts of benefit provided, it is equally vague, ambiguous and incomplete as to the schedule under which those benefits will be provided to employees. While not its burden of proof, the County provided expert witness testimony that the plan administered for Columbia County as well as for numerous other employers does not provide the type of benefit claimed by the Union in this case. In other words, the Union's claimed benefit for glasses and contact lenses under Appendix D simply does not exist. The complaint should be dismissed.

DISCUSSION

The Complainant labor organization maintains that the Respondent municipal employer has violated the collective bargaining agreement and Secs. 111.70(3)(a)5 and derivatively 1, Wis. Stats., by not providing the employee, Barton, with vision insurance coverage for both contact lenses and glasses lenses/frames for her dependent as required by the collective bargaining agreement in Article 17 and Appendix D – Vision Plan. I disagree and have ordered the complaint dismissed. The Respondent did not violate or breach the collective bargaining agreement and thus, did not commit a prohibited practice under Chapter 111.70, Wis. Stats.

The merits of this case involve the issue of whether or not the County violated the collective bargaining agreement with the Union. Given the procedural posture of the case I will act as a *de facto* grievance arbitrator and decide the matter by construing the parties' collective bargaining agreement as applied in this case to determine if it was violated.

The Union's central point is that the language of Appendix D is clear and unambiguous, and that it specifically provides for both eyeglass lenses/frames and contact lenses in any given 12-month period. Any vision insurance plan secured by the County must meet the requirements that are provided in Article 17 and Appendix D, and the County thus has an obligation to provide a vision insurance plan that complies with the specific provisions of Appendix D. When the insurance plan did not pay for both eyeglass lenses/frames and contact lenses in the same 12 months, argues the Union, the County breached the agreement. The County disputes that, and contends that Appendix D is only a very general summary and is ambiguous, requiring interpretation from beyond the agreement itself and specifically refers to the plan documents and its schedule of vision insurance benefits which contains an "in lieu of lenses/frames" limitation on contact lenses availability. It argues that it complied with the collective bargaining agreement as more fully detailed in the vision insurance plan itself when there was payment for eyeglass lenses/frames, but not contact lenses, in the same 12 months.

In this case, Article 17 Section 1 of the collective bargaining agreement refers to a vision insurance plan, but does not further detail the plan or define what benefits are in the plan. The Article does state that the plan shall provide benefits which are at least equal in all respects to the group plans attached as Appendices B – D, with Appendix D being the vision plan. As relates to the vision plan, Appendix D does not detail the plan or benefits other than to state:

APPENDIX D – VISION PLAN

<u>STANDARD EXAMINATION</u>	One (1) every 12 months
<u>STANDARD LENSES</u>	One (1) every 12 months
<u>STANDARD FRAMES</u>	One (1) every 24 months
<u>STANDARD CONTACT LENSES</u>	One (1) every 12 months

The parties do not dispute that the actual plan documents, herein Joint Exhibit 2, contain greater specific detail about the vision plan than is contained in Appendix D.

The Union argues that the contract interpretation principle of "to say one thing is to exclude other things" defeats the County argument that Appendix D is ambiguous. The Union's argument is known as the rule: *expression unius est exclusio alterius*. See, Elkouri & Elkouri, How Arbitration Works, 6TH Ed. pp. 467, 468. The Union argues that Appendix D affirmatively provides one examination every 12 months, one pair of lenses every 12 months, one glasses frames every 24 months, and one pair of contact lenses every 12 months. As argued by the Union, to say these benefits will be provided on this schedule is to exclude that they will be somehow limited by the addition of words like "or, in lieu of, except, but" et cetera as the employer has attempted to do through the addition of the words, "in lieu of" in

the plan it purchased from the Wisconsin Counties Association. However, the limit, or condition, on contact lens coverage is no different than the limit on how much the plan will pay for any of the benefits. The Union argues that the in lieu of limit directly conflicts with the language of Appendix D, and that is what makes it different than the dollar amount limitations for the benefits. Yet the Union does not explain how one limit, in lieu of, is any different than another limit such as a dollar amount. In one instance the benefit is limited by a maximum dollar amount of coverage, while in the other instance the benefit is limited by both a maximum dollar amount and the in lieu of condition. Neither type of limitation is stated in Appendix D. Yet the Union does not contend that there cannot be any dollar amount limitations on the benefits provided in Appendix D. Article 17 Section 1 and Appendix B make it clear that the benefits are to be provided through group plans. That necessarily implies that there is more detail in the plans themselves than in the benefit provisions of the collective bargaining agreement. The benefit that is expressed in Appendix D is not excluded by the limitation on the availability of the benefit. The expression of a benefit in Appendix D does not by itself render Appendix D clear and unambiguous.

A contract term is said to be ambiguous if it is susceptible of more than one meaning, that is, if “plausible contentions may be made for conflicting interpretations.” Elkouri & Elkouri, How Arbitration Works, 6th Ed., p. 434 (citations omitted). The Union proffers a plausible meaning for Appendix D, that it specifies standard lenses and standard frames as well as contact lenses every 12 months. That is what Appendix D provides. The County also proffers a plausible meaning for Appendix D, that it is just a basic summary and it does not say lenses/frames “and” contact lenses, or lenses/frames “or” contact lenses, with the details actually contained in the vision insurance plan much as all the other conditions and limitations on the vision benefits are, such as dollar amount limits, the meaning of “standard”, the type of lenses or contact lenses (i.e., hard or soft contact lenses), etc. There are thus presented two plausible contentions for the meaning of Appendix D, rendering the collective bargaining agreement ambiguous on those provisions.

There is a reference to vision benefits in Schedule B. That simply states:

APPENDIX B - MEDICAL SCHEDULE OF BENEFITS
FOR ALL ELIGIBLE PARTICIPANTS AND DEPENDENTS

SELECT PLAN

* * *

<u>TYPE OF COVERAGE</u>	<u>IN NETWORK</u>	<u>OUT OF NETWORK</u>
VISION BENEFITS	Select Plan Vision Benefits	Select Plan Vision Benefits

This indicates that the vision benefits, whether obtained in network or out of network, are the vision benefits in the select plan. Neither Appendix B nor Appendix D further describe what is contained in the plan itself.

While the insurance plan must provide the coverage required by the terms of the collective bargaining agreement, the question still remains as to what those terms are when faced with the ambiguity in Appendix D. When faced with ambiguous language it is appropriate to look to other sources to determine the meaning of the terms, as argued by the County. One obvious source here is the vision plan document itself and the schedule of vision benefits.¹ Appendix B does indicate that it is the plan that is the schedule of coverage for vision benefits. The schedule and plan have been in effect since the benefits were implemented in 1991. Bargaining unit members have had the plan document and the schedule. The plan and schedule do contain other conditions and limitations not mentioned in Appendix D, such as dollar amount limits for coverage, which neither Barton nor Complainant Union argue are not in compliance with the collective bargaining agreement.

The schedule of vision benefits in the vision insurance plan document does contain the “in lieu of lenses/frame” limitation of the coverage of contact lenses every 12 months. This limits or conditions payment for contact lenses. If eyeglass lenses/frames are provided in the 12-month period, then there is no coverage for contact lenses in the same 12-month period. This limitation is no different than the other limitations in the schedule not complained about by the Union, such as the differing dollar amounts that will be covered for the various types of lenses. Those limits are not detailed in Appendix D either. The schedule also explains in more detail that things like coatings and sunglass lenses are not covered. The plan document and schedule of vision benefits adds meaning to the general provisions of Appendix D. The limitation and condition for contact lenses availability resolves the ambiguity in favor of the County.

In considering ambiguous language in a collective bargaining agreement it is appropriate to look to any bargaining history or past practice to help determine the intent of the parties. Here there is no significant bargaining history to aide in interpreting Article 17 Section 1 and Appendix D. There is, however, the conduct of the parties since 1991 when the vision plan was adopted. The record is clear that since 1991 there has been no payment under the vision insurance plan for both eyeglass lense/frames and contact lenses in a 12-month period, and no other grievances or complaints have been filed by the Union over the matter. This is from the uncontroverted testimony of the person who has administered the vision insurance provisions of the plan for the County for the past 14 years, and who was also familiar with the claims paid data for the plan. In a complaint case where the issue is breach of a collective bargaining agreement it is the burden of the Complainant, in this case the Union, to prove the breach. The Union has not established a past practice to the contrary. That is understandable given the Union position that the language was clear and unambiguous and there is no need to resort to past practice or evidence outside of the collective bargaining agreement. But stated the opposite way, if the Union membership had intended and understood that there was coverage for both in the same 12 months, the conduct of the parties does not support that. The conduct of the parties as supplied by the evidence of record does support the conclusion that both parties understood that the benefits in Appendix D were more fully

¹ Where the collective bargaining agreement was ambiguous regarding coverage of a claim but an insurance booklet was “very clear and definitive” against it, the claim was held not covered. *BARBER COLMAN CO.*, 78 LA 433 (Holly, Jr., 1982), cited in *Elkouri & Elkouri, How Arbitration Works*, 6th Ed., p. 467 at footnote 176.

fully explained, and limited, by the plan documents and schedule of vision benefits.

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The ambiguity in Appendix D is resolved by the specifics in the plan document and schedule of vision benefits, which has been followed by the parties since 1991. Those specifics do not conflict with the provisions of the collective bargaining agreement, but rather more fully implement those provisions in a manner apparently found acceptable by the Complainant and its members since 1991. The Respondent County supplied the benefit provided for in Appendix D in the same manner as it always has, and in compliance with the terms of the collective bargaining agreement. It did not breach the agreement when the charges for eyeglass frames and lenses were paid up to the dollar amount of coverage stated in the plan schedule and then did not pay for contact lenses within 12 months of paying for the eyeglass lenses/frames. Thus, the Respondent did not violate Sec. 111.70(3)(a)5 and derivatively 1, Wis. Stats. Accordingly, I have dismissed the complaint.

Dated at Madison, Wisconsin this 24th day of February, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Paul Gordon /s/

Paul Gordon, Examiner

32883-A